Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

JOSEPH P. NAPOLI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether either the "plain error" standard of review under Rule 52(b) of the Federal Rules of Criminal Procedure or the standard of review under 28 U.S.C. §2255 may fairly be imposed upon a defendant whose failure to raise a valid claim at trial was caused by a reasonable reliance upon a well-settled but erroneous interpretation of the prevailing law by the Court of Appeals with jurisdiction over the District in which he was tried.

2. Whether, if it was proper to apply the "plain error" or the 28 U.S.C. §2255 standard in such a case, those standards were properly applied so as to deny relief to a defendant who was given no notice that a defense existed to the charges against him and who therefore had no opportunity to be heard and to present evidence upon that defense.

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In the

Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH P. NAPOLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Joseph P. Napoli respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit, not yet officially reported, is set forth *infra* at App. A18-29. The opinion of the District Court for the Eastern District of New York is unreported and is set forth *infra* at App. A1-17.

JURISDICTION

The Second Circuit entered its judgment on August 4, 1994. A timely petition for rehearing was denied on September 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Rule 52(b) of the Federal Rules of Criminal Procedure provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT

A. The Proceedings at Napoli's Trial

Petitioner Joseph P. Napoli ("Napoli") was tried, with others, before a jury upon a two-count RICO indictment in the United States District Court for the Eastern District of New York. The gravamen of the charges was that, as a trial attorney for a personal injury law firm (the "Eisen firm"), Napoli had conducted and conspired to conduct the affairs of that enterprise through a pattern of racketeering activity (using mail fraud and bribery to secure settlements and verdicts in its cases) in violation of 18 U.S.C. §1962(c) and (d).

Pursuant to the well-settled Second Circuit interpretation of the sections involved, in *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert denied*, 452 U.S. 961 (1981), the trial court (Sifton, J.) charged the jury as follows:

> The prosecution is not required to prove that the defendant participated in the management or control of the enterprise.

This was the "settled" (App. A19) "controlling law" (App. A6) at the time of the charge and no exception to it was taken by Napoli.

B. Napoli's Appeal

Convicted on both counts, Napoli appealed to the Second Circuit. While that appeal was pending, this Court granted *certiorari* in *Reves v. Ernst & Young*, 502 U.S.___, 112 S.Ct. 1159, 117 L.Ed. 2d 407 (February 24, 1992). In a reply brief, Napoli advised the Second Circuit of this grant of *certiorari*. On August 17, 1992, the Second Circuit affirmed Napoli's conviction. *United States v. Eisen, et al.*, 974 F.2d 246 (2d Cir. 1992).

C. This Court's Decision in *Reves v. Ernst & Young* and Napoli's Petition for a Writ of Certiorari

On March 3, 1993, this Court decided the *Reves* case, (507 U.S.__, 113 S.Ct. 1163, 122 L.Ed. 2d 525) holding, *inter alia*, that a defendant "must participate in the operation or management of the enterprise itself to be subject to liability" under the statute. Napoli's petition for a writ of certiorari (No. 92-969), which raised the issue of *Reves*' implicit overruling of *Scotto*, was denied on April 19, 1993. 507 U.S. ___, 113 S.Ct. 1619, 123 L.Ed.2d 467.

D. Napoli's Petition Under 28 U.S.C. § 2255

Thereafter, Napoli petitioned the District Court for relief pursuant to 28 U.S.C. §2255. He argued that the instructions given on the elements of the crime were proper under *Scotto* but erroneous under *Reves* and in a supplemental submission to the trial court, further argued that:

> [S]ince this was not an issue before the jury I never had an opportunity to specifically present my proof on this issue.

The District Court denied the motion (App. A1-17), holding that the charge, as given, satisfied *Reves*, as did the proof at trial.

On appeal, Napoli argued in his original brief that "not knowing that operation/management was an issue, let alone a jury issue," he "never refuted facts that the court below is relying upon ..." and argued in his reply brief that he was "prejudiced by not having an opportunity to litigate factually and legally the *Reves* operation and control test before the jury ..., and that he "would have taken a different approach to the RICO conspiracy charge if it was known that the *Reves* operation/management test was part of the mix."

The Second Circuit affirmed the denial of Napoli's §2255 motion (App.19-29), assuming, however, that the instructions were "erroneous" but holding, *inter alia*, that relief was not available to Napoli since "there was overwhelming evidence presented to the jury that Napoli ... played some part in directing the affairs of the charged enterprise" (App. 27). Thus, held the Second Circuit, Napoli could not even meet the "plain error" error standard under Rule 52(b), much less the stricter standard under §2255 which, as it noted, requires a showing of "a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law that constitutes 'a fundamental defect which inherently results in a complete miscarriage of justice.'" (Citations omitted.)

In his petition for rehearing, under a point claiming that "he was prejudiced when he planned a defense and proceeded to trial on an erroneous legal theory," Napoli argued as follows:

> It is undisputed that when Napoli went to trial, *Scotto* ... was a well-settled rule that made it futile *to plan a defense that required that the prosecutor prove that he managed and controlled the enterprise.* No such defense was made in this case, since Napoli and his attorney relied upon the erroneously-decided *Scotto.* See *Reves* ....

> With this sequence of events, the misinformation of *Scotto*, ... the change in the substantive law, the District Court's charge to the jury and Napoli's justified reliance, the conviction and sentence herein was a "complete miscarriage of justice."

The petition for rehearing was denied. This petition followed.

REASONS FOR GRANTING THE PETITION

I.

Neither the "Plain Error" Standard of Appellate Review Under Rule 52(b) of the Federal Rules of Criminal Procedure Nor the Standard of Review Under 28 U.S.C. §2255 May Fairly Be Imposed Upon a Defendant Whose Failure To Raise a Valid Claim at Trial Was Caused by His Reasonable Reliance Upon a Well-Settled But Erroneous Interpretation of the Prevailing Law by the Court of Appeals With Jurisdiction Over the District in Which He Was Tried

The issue involved here was perhaps best expressed by this Court in *Hormel v. Helvering*, 312 U.S. 552, 557 (1941), in these words:

> There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court ... below. ...
>
> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. ... Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

After reviewing relevant decisions, this Court went on to say, at 558-59, that:

> These decisions and others like them, while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice. Analogous in principle is the philosophy which underlies this Court's decisions with relation to appellate practices in other cases: [such as] ... those in which there have been judicial interpretations of existing law after decision below and pending appeal — interpretations which if applied might have materially altered the result.[1]

Napoli brings to this Court just such a case.

Had he foreseen this Court's decision in *Reves*, which implicitly overruled the well-settled Second Circuit rule in *Scotto* to the effect that the Government had no need to prove that he had participated in the management or control of the criminal enterprise known as the Eisen law firm, Napoli would have excepted to the District Court's contrary instruction to the jury; far more important, had the actual soon-to-be-announced rule been known, he could have planned and presented a defense showing that he had not so participated.[2] His failure to do the former was the result of a

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[1] In *Hormel*, this Court remanded the matter so that the petitioner could offer evidence to show that he would benefit by the newly-announced rule.

[2] In a case permitting an appellant to benefit from a later change in the law, unraised by him at trial and upon appeal, the Second Circuit stated that:

reasonable reliance upon *Scotto*; his failure to do the latter was the result of the erroneous "law" then in effect. The burdens of the "plain error" standard of Rule 52(b) and those of 28 U.S.C. §2255 may not, therefore, be fairly imposed upon him.

Almost six decades ago, in *Patterson v. Alabama*, 294 U.S. 600, 607 (1935), this Court stated as follows:

> We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.

Pursuant to that power to do justice, this Court has recognized the right of a defendant to assert upon appeal, without penalty or restriction, a defense unraised by him at trial because it was not yet then judicially-recognized. In *Westover v. United States*, 384 U.S. 436 (1966), for example, the defendant's failure to object at trial to the introduction of an improperly-obtained confession was held by this Court not to prevent it from hearing his claim, since its decision which first announced new rules on the issue[3] had not yet been decided at the time of Westover's trial.[4] In *O' Connor v. Ohio*, 383

> Were we to penalize ... [appellant] for failing to challenge such entrenched precedent, we would ascribe to attorneys and their clients the power to prognosticate with greater precision than the judges of this court. Such a rule would encourage appeal of even well-settled points of law. We see no value in imposing a responsibility to pursue such a "patently futile" course.

See *Ingber v.Enzor*, 841 F.2d 450, 454-55 (2d Cir. 1988).

3 See *Escobedo v. Illinois*, 378 U.S. 478 (1964).

4 This Court noted in *Westover*, 384 U.S. at 495 n.69, that the defendant's failure to raise the issue at trial was commented upon by the Ninth Circuit and

U.S. 92 (1966), a state defendant was permitted to rely upon this Court's ruling in *Griffin v. California*, 380 U.S. 609 (1965) (holding unconstitutional a prosecutorial comment upon a defendant's failure to testify), even though he had never raised the issue at trial, since *Griffin* had not yet then been decided.[5] In *Grosso v. United States*, 390 U.S. 62 (1968) this Court permitted the defendant to benefit from its holding that the Fifth Amendment was a defense to his prosecution under the wagering tax law even though he had not raised it at trial, since case law provided no such defense at the time of trial. And in *Leary v. United States*, 395 U.S. 6 (1969), the appellant was given the benefit of this Court's recognition of a Fifth Amendment defense to the charges against him by virtue of three cases decided after his trial[6] — a defense which he obviously had not raised at trial.

United States v. Quintinilla, 2 F.3d 1469 (7th Cir. 1993), involved a defendant (Gutierrez) who asked that her conviction be set aside because she had been tried under a RICO theory of criminal liability

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emphasized by the Solicitor General.

5 In earlier days, even the Second Circuit and the Government took the position that the failure to raise at trial a defense not yet created by court decision did not preclude the defendant from raising it on appeal. See, e.g., *United States v. Minor*, 398 F.2d 511, 512 n.2 (2d Cir. 1968), *aff'd*, 396 U.S. 87 (1969), where the Second Circuit, without Governmental opposition, considered the defendant's Fifth Amendment defense even though he had not raised it at trial, his failure to have done so having been caused by the fact that the defense had not yet been announced by this Court. See also *United States v. Manfredonia*, 391 F.2d 229, 230 (2d Cir. 1968) (reversal on Fifth Amendment defense, even though unraised at trial; "these defendants should not be required to anticipate the Supreme Court action ... [creating a privilege defense to the wagering tax statute] or compelled to make the futile gesture of raising the privilege at trial to preserve their rights in the event of an overruling decision."

6 See: *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); and *Haynes v. United States*, 390 U.S. 85 (1968).

somewhat broader than that authorized by this Court in *Reves*. The Seventh Circuit noted, 2 F.3d at 1484 n.20, that:

> The government argues that Gutierrez has waived this argument because she did not present it to the district court. We disagree. The Supreme Court granted certiorari in *Reves* to resolve a split among the circuit courts of appeals concerning a substantive issue of law. While Gutierrez may have known of the split in authority at the time of her trial, she could not have known of the Supreme Court's resolution of the issue; certiorari was granted, and the case was decided, after she had been tried and convicted. Gutierrez raised her argument under *Reves* at the first opportunity. We think this is sufficient to allow us to reach the merits of her claim.

Here, however, facing precisely the same procedural situation, the Second Circuit took precisely the opposite approach — it refused to reach the merits of Napoli's claim except by squinting at them through the keyhole of the "plain error" rule and the even more stringent standards inflicted upon litigants by 28 U.S.C. §2255.[7]

We respectfully submit that the issue raised is an important one and that this Court should consider whether, under the circumstances, Napoli should be so harshly penalized for having failed to perform the "futile" act of raising a valid objection at trial which had not yet been judicially established in the District.

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[7] The stark contrast between these two cases — each dealing with one who reasonably failed to predict what this Court would do in *Reves* — demonstrates a conflict between the two Circuits as to whether an appellant should be heard on the merits concerning an issue unraised at trial because not yet announced by a higher court. It is a conflict which this Court should resolve so that a defendant in Albany may be treated the same as one in Appleton.

II.

It Was "Plain Error" and "Constitutional Error" For Napoli To Be Tried Without Being Given Notice of a Valid Defense to the Charges Against Him, Thereby Denying Him the Opportunity To Be Heard and To Present Evidence Upon That Defense

In affirming the District Court's denial of relief to Napoli, the Second Circuit found (App. A10) that "there was overwhelming evidence presented to the jury that Napoli ... played some part in directing the affairs of the charged enterprise," i.e., the Eisen law firm. The Second Circuit therefore held (App. A10-11) that:

> On the record in this case, we conclude ... that the challenged instruction did not "affect the fundamental fairness of the trial." . . . That being so, we must conclude that the instruction did not amount to a "fundamental defect which inherently results in a complete miscarriage of justice" warranting relief under section 2255.

In viewing the error as one which involved merely the "challenged instruction" that the prosecution need not prove that Napoli participated in the management or control of the enterprise, the Second Circuit missed, as did the District Court, the constitutional issue upon which Napoli relies.

Dissenting almost eighty years ago in *Frank v. Magnum*, 237 U.S. 309, 347 (1915), Justice Holmes stated that:

> Whatever disagreement there may be as to the scope of the phrase "due process of law," there can be no doubt that it embraces the fundamental concept of a fair trial, with opportunity to be heard.

And, as the Second Circuit put it in *United States v. Corr*, 543 F.2d 1042, 1051 (2d Cir. 1976):

> It has been long recognized that a defendant's right to present a full defense is a fundamental element of due process derived from both the Sixth and Fourteenth Amendments. *Chambers v. Mississippi*, 410 U.S. 284, 302 ... (1972); *Webb v. Texas*, 409 U.S. 95 ... (1972); *Washington v. Texas*, 388 U.S. 14 ... (1967); *In re Oliver*, 333 U.S. 257, 273 ... (1948).

It was that due process right which Napoli was denied through no fault of his own; it was that right of which he was deprived through his reasonable reliance upon the Second Circuit's erroneously-decided, but too-late-corrected, holding in *Scotto*; and it was that same right which the courts denying him relief failed to recognize.[8]

Critical to a resolution of this issue is the recognition that what happened at Napoli's trial was no mere instruction made erroneous

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[8] Cases finding "plain error" under Rule 52(b) or a "constitutional error" or "miscarriage of justice" under 28 U.S.C. §2255 often find them where an instruction (as here) gave a jury a broader theory of guilt than did the statute involved or where (as here) the defendant had been deprived of the right to have his defense adequately heard. See, e.g.: *United States v. Sturm*, 870 F.2d 769 (1st Cir. 1989) (instruction to jury on defendant's "claim of right" defense insufficient; conviction reversed despite defendant's failure to raise issue at trial); *United States v. Flitcraft*, 803 F.2d 184 (5th Cir. 1986) (trial court's instructions deprived defendants of their "good-faith mistake of law" defense; conviction reversed despite lack of exception); *United States v. Panter*, 688 F.2d 268 (5th Cir. 1982) (charge which omitted defense of self-defense, though not excepted to, was "so clearly erroneous as to result in a likelihood of a grave miscarriage of justice;" conviction reversed); *United States v. Munz*, 504 F.2d 1203 (10th Cir. 1974) (inadequate charge on insanity defense held reversible error, despite lack of exception); *United States v. Williams*, 478 F.2d 369 (4th Cir. 1973) (jury instruction on crime charged overly broad, permitting a

solely by what it said or left unsaid. If a defendant tries a case or puts in a defense according to a proper understanding of the applicable law, but then fails to object to an instruction which improperly lessens the prosecutor's burden or increases his, it may not be unfair to point out, in affirming his conviction, that the evidence against him on the issue was "overwhelming." But if the defect caused him to be faultlessly blind to the existence of a valid defense, the words "overwhelming evidence" should not be heard to deny him the benefits of that unseen defense. Can it fairly be said, for example, that identification evidence establishing that the defendant was the robber of a bank was "overwhelming" when the defendant was denied the opportunity to refute that evidence by proving an alibi? Can the "strength" of evidence of specific intent, for example, fairly be used on appeal to justify a trial court's erroneous exclusion of evidence of intoxication relevant to the existence or non-existence of specific intent? This petition involves the same issue.

Napoli's justified reliance upon the well-settled but erroneously-decided *Scotto* deprived him of his due process right to present a full defense.[9] Such a deprivation is of clear constitutional

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conviction on a non-criminal set of facts; conviction reversed despite absence of objection); *United States v. Fields*, 466 F.2d 119, 121 (2d Cir. 1972) (judge's instructions on crime charged broader than statute; conviction reversed despite absence of exception) ("We regret the need for a new trial because the evidence of the guilt of these defendants was substantial, but we do not see how we can fairly follow any other course. This is not, after all, a case of nit-picking over nuances in a judge's charge; the errors go directly to a defendant's right to have the jury told what crimes he is actually being trial for and what the essential elements of those crimes are.").

9 The constitutional right to counsel is based in large part on the proposition that only the assistance of counsel may enable a defendant "to know all the defenses available to him ...." *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961). Surely it is of equal constitutional import that a defendant may be tried, even though with

proportion. Even if the "plain error" standard or the standard of review under 28 U.S.C. §2255 was applicable, the constitutional harm inflicted upon Napoli met that standard. In short, a further due process violation occurred when the Second Circuit applied improper standards in failing to grant him relief for the earlier due process violation.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

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counsel by his side, with those defenses unavailable to him, and thus unheard by the jury, because of a reasonable reliance upon an erroneous but well-settled interpretation of the statute under which he is tried.

APPENDICES

BEST AVAILABLE COPY

APPENDIX A

United States District Court
Eastern District of New York

UNITED STATES OF AMERICA
-against-
MORRIS J. EISEN, et alia,
Defendants.

CR-90-00018 (CPS)

MEMORANDUM AND ORDER

SIFTON, District Judge

Petitioners, Joseph P. Napoli, Harold M. Fishman, Alan Weinstein, Dennis Rella, and Marty Gabe, seek, pursuant to 28 U.S.C. § 2255, to vacate and set aside their criminal RICO convictions or, in the alternative, a new trial. Petitioners argue that, in light of the Supreme Court's decision in *Reves v. Ernst & Young*, 113 S. Ct. 163 (1993), handed down after the affirmance of their criminal convictions, the jury charge on the elements of 18 U.S.C. §1962(c) was erroneous and their convictions, as a result, invalid. In addition, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, defendant Napoli argues that newly discovered evidence mandates a new trial in his case. For the reasons set forth below, both the petitions and Napoli's Rule 33 motion are denied.

BACKGROUND

On March 4, 1991, the petitioners, in addition to two other co-defendants, were convicted on two counts of conducting and conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. §1962(c) and (d).

The charges in this case are based on allegations that the law firm of Morris J. Eisen, P.C. (the "Eisen firm") conducted civil litigation using mail fraud and bribery in order to secure settlements and jury verdicts for its clients in personal injury cases.

The defendants in the criminal case were attorneys, an office manager, and investigators employed by the Eisen firm, which specialized in the representation of plaintiffs in personal injury lawsuits on a contingency-fee basis. Napoli was a lead trial attorney for the firm and a principal of an entity known as the "Law Offices of Morris J. Eisen and Joseph P. Napoli," which operated as counsel in some of the cases tried by Napoli. Fishman was also a trial attorney and worked in an "of counsel" capacity with the firm. The indictment charged that these two defendants had responsibility for preparing and trying cases for the Eisen firm.

Rella, Weinstein, and Gabe were private investigators who were hired by the firm in connection with the firm's prosecution of some of the fraudulent cases. The indictment charged that these defendants had responsibility for assisting the Eisen firm's trial attorneys in preparing and trying the cases.

The indictment alleged that some twenty-six underlying acts of racketeering were committed in connection with the operations of the firm in litigating seventeen personal injury lawsuits including numerous acts of mail fraud, in violation of 18 U.S.C. § 1341, and bribery of witnesses, in violation of New York Penal Law § 215.00. The evidence at trial established that the defendants prosecuted these personal injury cases by presenting false testimony and falsified evidence and secured settlements or jury awards in these cases from which the Eisen firm earned millions of dollars in contingency fees. Defendants paid or otherwise pressured individuals to testify that they had witnessed accidents or events when, in fact, they had not observed them and paid actual witnesses not to testify where the anticipated testimony was unfavorable to their client's case. In addition, defendants created false photographs, documents, and

physical evidence of accidents for use before and during the trial of these cases.

The petitioners' and the other two co-defendants' convictions were affirmed on appeal. *United States v. Eisen*, 974 F.2d 246, 268 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1841 (1993) .

DISCUSSION

Section 2255 Petitions

The petitioners' section 2255 petitions rest on the argument that the Supreme Court's construction of 18 U.S.C. §1962(c) in *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993), demonstrates that a jury instruction with regard to the nature and extent of a defendant's participation in the criminal enterprise necessary to sustain a RICO violation was erroneous. This error, petitioners contend resulted in convictions for conduct not proscribed by federal law.

The *Reves* decision was announced after petitioners' convictions were affirmed on appeal. However, as an authoritative construction of section 1962(c), the holding in Reves may affect the validity of RICO convictions entered previously. The Supreme Court's interpretation of a criminal statute describes the breadth of a statute since the day of its enactment and not merely in future applications. *See United States v. Mandel*, 862 F.2d 1067, 1072-75 (4th Cir. 19&8), cert. denied, 491 U.S. 906 (1989); *see also United States v. Stoneman*, 870 F.2d 102, 105 (3rd Cir. 1989), *cert. denied*, 493 U.S. 891 (1989). In that sense, *Reves* applies "retroactively" if the statutory construction in Reves demonstrates error amounting to a fundamental defect that results in a miscarriage of justice. *Davis v. United States*, 417 U.S. 333, 342, 346 (1974); *see Ingber v. Enzor*, 841 F.2d 450, 454 n.1 (2d Cir. 1988); *United States v. Sood*, 969 F.2d 774, 775-76 (9th Cir. 1992). In such circumstances, a court is more accurately described as correcting error rather than applying a new rule of law retroactively. *Belt v. United States*, 868 F.2d 1208

(11th Cir. 1989). Such an application is a "necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place." *Ingber*, 841 F.2d at 453-54; *see United States v. Johnson*, 457 U.S. 537, 550 (1982).

Where the new rule of substantive law is announced after a defendant exhausts his direct appeals, the defendant is not procedurally barred from attempting to benefit from the new rule on collateral attack of the conviction. Ingber, 841 F.2d at 454; *see also United States v. McClelland*, 941 F.2d 999, 1001 (9th Cir. 1991). A petitioner must, of course, show cause for failure to raise a claim during the direct case, and actual prejudice resulting from that failure, *United States v. Frady*, 456 U.S. 152, 173 (1982); *Campino v. United States*, 968 F.2d 187, 189 (2d Cir. 1992), or, alternatively, demonstrate that the direct proceedings have resulted in a fundamental miscarriage of justice. *Engle v. Isaac*, 456 U.S. 107, 135 (1982); *Davis v. United States*, 417 U.S. 333, 346 (1973); *see United States v. Stoneman*, 870 F.2d 102, 105 (3rd Cir. 1989), cert. denied, 493 U.S. 891 (1989); *see also Coleman v. Thompson*, 111 S. Ct. 2546, 2564-65 (1991). Here, petitioners claims amount to an assertion of fundamental error resulting in a miscarriage of justice because, they assert, they were convicted under a statute for conduct not proscribed by that statute as explained by the Supreme Court's decision in *Reves*. Thus, the procedural requirements of 28 U.S.C. § 2255 do not bar reaching the merits of petitioners' claim of fundamental error at trial. *See also Lomelo v. United States*, 891 F.2 512, 1515-16 (11th Cir. 1990).

The petitioners were convicted under the provision of RICO:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs

> through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c).

In *Reves*, the Supreme Court, construing the phrase "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs," 18 U.S.C. § 1962(c), considered the requisite nexus between the enterprise and the pattern of racketeering. *Reves*, 113 S. Ct. at 1169. The Supreme Court acknowledged a split among the various circuit courts that had construed this phrase and ruled that the correct understanding of the statute is as follows:

> We hold that to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs,' ... one must participate in the operation or management of the enterprise itself.

Reves, 113 S. Ct. at 1169, 1172-73.

The Court explained that his test is satisfied where the defendant has "some part in directing the enterprise's affairs." *Reves*, 113 S. Ct. at 1170. A person need not be part of the "formal" management of the enterprise nor in upper management to be liable under this provision. An "outsider," one without a formal position in the enterprise, may be found to be liable under this provision where such an outsider takes part in the operation of the enterprise. *Id.* at 1170, 1173. Likewise, liability is not limited to "upper management": RICO liability is "not limited to those with primary responsibility for the enterprise's affairs" or to those with "significant" control over an enterprise. *Id.* at 1170, 1170 n.4. "An enterprise is operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management." Id. at 1173.

The *Reves* decision resolves an important controversy over the extent of liability under section 1962(c). Prior to this decision, some

courts, including the Court of Appeals for the Second Circuit, had taken a broader view of section 1962(c) liability than the operation or management test adopted in *Reves*. *See Reves*, 113 S. Ct. at 1168-69 (noting split between the D.C. Circuit and the Eighth Circuit on the one hand and the Eleventh Circuit on the other); *Yellow Bus Lines, Inc. v. Drivers, Chauffers & Helpers Local Union* 639, 913 F.2d 948 (D.C. Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 2839 (1991) (discussing different views of standard of liability under section 1962(c), including prevailing Second Circuit view); *see generally J. Rakoff & H. Goldstein*, RICO: **Civil & Criminal Law & Strategy** §1.06[3] (1993); 2 A. Mathews, A. Weissman, and J. Sturc, **Civil RICO Litigation** §7.03 (2d ed 1992); A. Breshnahan, J. Maull, E. Pearl, and S. Sze, **Racketeer Influenced and Corrupt Organizations** 30 Am. Crim. L. Rev. 847 (1993); **Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors** §III.C.3 (1990).

In *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), the Court of Appeals for this Circuit held that the requisite enterprise/racketeering nexus of section 1962(c) is satisfied where

> (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise.

Scotto, 641 F.2d at 54. The Court in that decision specifically rejected the argument that the trial court had erred by failing to charge the jury that conviction under section 1962(c) was improper unless the prosecution proved that the predicate acts related to the "operation or management" of the enterprise and affected its affairs in its "essential functions." *Id.* at 54. This understanding of section 1962(c) liability was controlling law at the time the jury was charged during the petitioners' criminal case. *See United States v. Minicone*, 960 F.2d 1099 (2d Cir.), *cert. denied*, 112 S. Ct. 1511, 113 S. Ct.

199 (1992); *United States v. Salerno*, 868 F.2d 524, 533-34 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989).

The petitioners in this case argue that *Reves* demonstrates that instructions concerning RICO liability based on *Scotto* are erroneous since *Reves* mandates a more restrictive reading of section 1962(c) liability than does *Scotto*. Thus, petitioner's argue that, to the extent this Court charged the jury in this case in accordance with principles expressed in *Scotto*, the Court provided the jury with an erroneous description of RICO liability and that their convictions are invalid.

It is true that *Reves* is inconsistent with the enterprise/racketeering nexus standard expressed in *Scotto* and to that extent *Reves* overrules the *Scotto* decision, although the Supreme Court does not address the *Scotto* decision expressly. *See Amalgamated Bank of New York v. Marsh*, F. Supp. 1993 WL 200160 (S.D.N.Y. June 4, 1993); *United States v. Altman*, 820 F. Supp. 794 (S.D.N.Y. 1993); *see generally* J. Rakoff & H. Goldstein, **RICO: Civil & Criminal Law & Strategy** §1.06[3] (1993); 2 A. Mathews, A. Weissman, and J. Sturc, *Civil RICO Litigation* §7.03 (2d ed 1992). However, the issue raised by petitioners is not the abstract question of whether the broad description of RICO liability expressed in *Scotto* is vitiated by the operation or management test adopted in *Reves*. Rather, the question with respect to the validity of petitioners convictions is whether the jury instructions and the prosecution's case presented to the jury are consistent with the standard set forth in *Reves*.

With that focus, it is apparent that the jury instructions in this case are consistent with *Reves'* operations or management test. The Court instructed the jury as to section 1962(c) liability as follows:

> In order to prove this fifth element, the prosecution must show that the defendant whose case you are considering knowingly and intentionally conducted or participated in the conduct of the affairs of the

enterprise through the pattern of racketeering activity. The word "through" simply means "by means of, in consequence of, or by reason of."

Simply put, the prosecution must prove that there is a meaningful connection between the pattern of racketeering activity and the affairs of the enterprise, that is, **that the defendant knew of the existence of the enterprise and intended that its affairs be furthered by the defendant engaging in a pattern of racketeering activity.**

* * * *

The prosecution is not required to prove that the defendant participated in the management or control of the enterprise. The prosecution is, however, required to prove that the defendant's acts were related to the enterprise and **that those acts were known to and were intended to further the affairs of the enterprise and did in fact further the affairs of the enterprise.**

The prosecution need not prove, as the statute indicates, that the defendant directly participated in the conduct of the affairs of the enterprise. It must prove, however, that the defendant either directly or indirectly conducted or participated in the conduct of the enterprise's affairs through the pattern of racketeering activity.

Trial Tr. at 9110-11 (emphasis added). In explaining the conspiracy charge in Count Two brought under 18 U.S.C. §1962(d), the Court said:

The elements of a violation of RICO have the same meaning in connection with Count Two as they have

> in connection with Count One, so I won't redefine them. I will summarize them.
>
> * * * *
>
> [T]he members of the conspiracy must have agreed that employees or associates of the enterprise would engage in a pattern of racketeering activity as I have previously described it, and must be shown to have agreed that this pattern would be a means through which the affairs of the enterprise could be conducted.
>
> You need not find that each member of the conspiracy, if you find one, agreed with every other, that the precise racketeering acts attributed to that defendant would be committed, provided you find that the members of the conspiracy agreed that at least two racketeering acts of bribery and mail fraud constituting a pattern would be committed and that the pattern would be a means through which the affairs of the enterprise would be conducted.

Tr. 9158-59.

The petitioners argue that the following portion of the section 1962(c) charge is erroneous under *Reves:*

> The prosecution is not required to prove that the defendant participated in the management or control of the enterprise. The prosecution is, however, required to prove that the defendant's acts were related to the enterprise and that those acts were known to and were intended to further the affairs of the enterprise and did in fact further the affairs of the enterprise.

Trial Tr. at 9110-11. The first sentence of this excerpt and the first phrase of the next sentence are based on the *Scotto* decision. *See* 2

Sand, Siffert, Loughlin & Reis, **Modern Federal Jury Instructions** 52.04 (1993); 2 Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** §48.08 (4th ed. 1990). However, the balance of the instruction is not and instead focuses on the extent to which the defendant's acts of participation in fact further the affairs of the enterprise itself and are known and intended by the defendant to advance those affairs. This is all that *Reves* requires.

The jury instruction that the prosecution need not prove that the petitioners participated In the "management or control of the enterprise" in order to establish their guilt under section 1962(c) is consistent with *Reves*. The Supreme Court in *Reves* expressly acknowledges that a person may be liable under section 1962(c) even though that person is not a management- level employee of an enterprise or one with complete control over the operations of the enterprise. *Reves*, 113 S. Ct. at 1170-73.

The first portion of the second sentence of the challenged portion of the charge is also consistent with *Reves'* operation or management test. In order for a defendant to have "some part in directing the enterprise's affairs," his participation must obviously be related to those affairs. *Reves*, 113 S. Ct. at 1170.

In addition to the above, the Court instructed the jury that the prosecution bears the burden of proving that the defendant's acts "were known to and were intended to further the affairs of the enterprise and did in fact further the affairs of the enterprise." A person who acts with the intention of "furthering the affairs of the enterprise" and whose acts are recognized by him to and do in fact "further the affairs of the enterprise" is a person who takes "some part in directing the enterprise's affairs."

When a criminal defendant challenges the sufficiency of a jury charge, the allegedly offending charge should not be evaluated in isolation; rather, in determining whether a charge was erroneous in ways that it materially prejudiced the defense, courts must evaluate

the entire case and instructions as they were presented to the jury. *See Frady, 456 U. S. at 169; Tenderson v. Kibbe,* 431 U.S. 145, 154 (1977); *Lomelo,* 891 F.2d at 1518; *United States v. Dynalectrlc Co.,* 89 F. 2d 1559, 1573 (11th Cir. 1988), *cert. denied,* 490 U.S. 1006 (1989). In this case, viewing the prosecution's case against each petitioner and the overall structure and content of the jury instructions, there is no possibility that the jury convicted the petitioners for conduct that is not proscribed by section 1962(c) as illuminated by *Reves.*

Given the nature of the proof and the requirement that the jury find that the acts of the petitioners in preparing and litigating cases for the Eisen firm were known and intended "to further the affairs of the enterprise," the jury of necessity found that these acts were acts of participation in directing the enterprise's affairs. *See Minicone,* 960 F.2d at 1107 (noting that the nature of the racketeering acts with which the defendant was charged and convicted necessarily presupposed a finding that defendant met requisite level of participation in the affairs of the enterprise); *Lomelo v. United States,* 891 F.2d 1512, 1519 (11th Cir. 1990) (given scheme alleged and proof presented to jury, there was no way that jury could have found defendant guilty of entering into scheme to defraud citizens of honest government without also finding that another purpose of the scheme was to deprive them of money or property.

In the closing statement, the prosecution explained to the jury that the defendants should be found guilty of RICO violations because they were "operating an enterprise through a pattern of other crimes." Tr. 706-07. Napoli was described as the "main trial attorney" who handled" the "very big cases" for the Eisen firm. Tr. 7410. Fishman was presented to the jury as "one of the main trial attorneys", and the other petitioners, Gabe, Rella, and Weinstein were described as private investigators who worked for the Eisen firm, assisting the trial attorneys in planning and trying their cases.

Tr. 7410-11. Each defendant's interest in the firm's overall success was described. The affairs of the enterprise in this case, i.e., the Eisen law firm, consisted principally if not exclusively in the preparation, settlement and trial of personal injury suits. Each of the petitioners occupied a role in the firm which necessarily entailed participation in the direction of the Eisen firm's affairs.

Absence of any real issue as to the extent of defendants' participation in the direction of the affairs of the enterprise is usefully highlighted by contrasting this case with *Reves*. *Reves* involved a civil RICO claim brought against an outside accounting auditor of a farming cooperative. The farming cooperative was alleged to be a RICO enterprise and the trustee in bankruptcy for the cooperative brought the civil RICO action against the accountant for allegedly filing false financial statements. In upholding the lower court's grant of summary judgment to the defendant, the Court found that the accountant in preparing audit reports based on information provided by the management of the cooperative was not participating in the operation or management of the cooperative itself. *Reves*, 113 S Ct. at 1173-74. Here, unlike *Reves*, there was no other enterprise, such as the outside accounting firm, whose affairs the defendants could have been pursuing.

The absence of a jury instruction anticipating *in haec verba* the *Reves* operation or management test is not fatal. Where a defendant challenges the sufficiency of a jury charge on the basis of an intervening change in law, a court will examine whether the instructions "sufficiently incorporated the substance" of the newly announced requirement. *United States v. Garcia*, 992 F.2d 409, 415 (2d Cir. 1993). The Court repeatedly referred the jury to the language of the statute itself, which sets forth the requisite enterprise/racketeering nexus of section 1962(c). In the circumstances of this case, the reiteration of the statutory language together with the instructions taken as a whole adequately expressed the prosecution's burden of proving the requisite nexus. *See United*

States v. Bonansinga, 855 F. 2d 476, 479 (7th Cir. 1988); *cf. McClelland*, 941 F. 2d at 1002-03 .

Petitioners contend that they were convicted on a theory of RICO liability that is inconsistent with *Reves'* operation or management test because the prosecution presented no evidence that "upper management" was involved in the alleged racketeering acts and that, being 'lower-rung" participants in the enterprise, they can be found guilty under section 1962(c) only if they were acting under the direction of upper management. Fishman Mem. at 3-4; Rella Mem. at 12; Weinstein Mem. at 10-11. However, the fact that the petitioners did not hold the formal titles of upper management is not controlling under the *Reves* standard. Even assuming the petitioners are correct in describing themselves as "lower rung" participants, the applicable test under *Reves* nonetheless remains the same: the question is whether these petitioners took some part in directing the operations of the firm; and as discussed above, to the extent that each person in committing the racketeering acts for which they were convicted prepared cases for trial or tried cases with the knowledge and intent that they were furthering the law firm's objectives, that question must be answered in the affirmative.

Napoli's Rule 33 Motion

At trial, Napoli was found guilty of bribing witnesses and otherwise causing witnesses to testify falsely in connection with the firm's handling of four personal injury lawsuits referred to by the parties as *Ferri*, *Mulnick*, *Robbins*, and *Rehberger*. He now argues that new evidence with respect to his involvement in the *Mulnick*, *Robbins*, *Ferri*, and *Rehberger* cases warrants a new trial pursuant to Federal Rule of Criminal Procedure 33.

Rule 33 provides that a court may order a new trial or a defendant on the basis of newly discovered evidence if the interests of justice require it. Fed. R. Crim. P. 33. "A district court must exercise great

caution in determining whether to grant a retrial on the ground of newly discovered evidence, and may grant the motion only in the most extraordinary circumstances." *United States v. Imran*, 964 F.2d 1313, 1318 (2d Cir.), *cert denied*, 113 S. Ct. 626 (1992); *United States v. DiPaolo*, 835 F.2d 46, 49 (2d Cir. 1987). To obtain a new trial under Rule 33, a defendant must establish that the evidence (1) is "in fact newly discovered and could not have been known to the defendant at the time of trial," (2) "could not have been discovered prior to or during trial with due diligence," (3) is "material, and not cumulative or merely impeaching," and (4) if admitted, "would probably lead to an acquittal." *United States v. Castano*, 756 F. Supp. 820, 823 (S.D.N.Y. 1991); *see United States v. Gordils*, 982 F.2d 64, 72 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1953 (1993); *United States v. Diaz*, 922 F.2d 998, 1006-07 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2035 (1991); *DiPaolo*, 835 F.2d at 49. A defendant bears the burden of satisfying these requirements. *United States v. Brown*, 582 F.2d 197,202 (2d Cir.), *cert. denied*, 439 U.S. 915 (1978); *United States v. Cruz*, 602 F. Supp. 825, 829 (S.D.N.Y. 1985); *United States v. Ochs*, 548 F. Supp. 502, 512 (S.D.N.Y. 1982), *aff'd*, 742 F.2d 1444 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *see DiPaolo*, 835 F.2d at 49. As discussed below, petitioner has not satisfied this burden.

1. *Mulnick*. Napoli claims that he has new evidence that supports his contention that he did not prepare Patricia Kibel to lie during testimony related to the Mulnick case. He states that, subsequent to Napoli's criminal trial, Kibel testified that Frank DeSalvo (another Eisen firm attorney) and Beth Mulnick prepared her testimony.

This "new" evidence is not material to the question of Napoli's guilt in perpetrating a mail fraud in connection with the *Mulnick* case. The prosecution was required to establish that Napoli "had either prepared or caused Kibel to testify falsely." *Eisen*, 974 F.2d at 257. "To prove this, it was plainly sufficient to establish that Kibel told Napoli the truth about the Mulnick accident but that Napoli did

nothing to dissuade her from testifying to the false version conjured by the Eisen firm and that he caused her to testify falsely by putting her on the stand and eliciting the perjurious testimony from her." *Id.* at 257-58.

Kibel's later testimony regarding the roles of DeSalvo and Mulnick in preparing her testimony in the *Mulnick* case does not directly relate to Napoli's role in perpetrating the fraud. The identification of additional participants in the witness preparation of Kibel does not negate Napoli's role in the fraudulent scheme.

At best, this "new" testimony would impeach Kibel's prior testimony. However, newly discovered cumulative impeachment material will not support a Rule 33 motion. *See Diaz*, 922 F.2d at 1006; *Cruz*, 602 F. Supp. at 832.

Napoli next claims that he has discovered evidence that proves the settlement in *Mulnick* cannot be attributed to his fraudulent conduct. He states that in testimony taken subsequently to Napoli's trial, one of the defendants in the Mulnick case, Peter Kadaras, revealed for the first time his criminal record and his use of illegal drugs; Napoli further claims that the transcript of Kadaras' later testimony establishes Kadaras' negligence in the *Mulnick* case. Napoli thus argues that Kadaras' later testimony demonstrates that the *Mulnick* case was settled as a result of the evidence of Kadaras' drug use and negligence, and not because of any wrongful conduct on Napoli's part.

However, Kadaras' criminal record or alleged negligence does not negate the role that fraud in fact played in inducing the settlement, and in all events the issue is not what motivated the settlement in fact but what the defendant intended. Kadaras' subsequent testimony proffered by Napoli constitutes at best cumulative impeaching material. Such material does not provide sufficient grounds for retrial. *Diaz*, 922 F.2d at 1006; *Cruz*, 602 F. Supp. at 832. Additionally, there has been no showing that this

allegedly new evidence would likely lead to acquittal and "create a reasonable doubt that did not otherwise exist." *Diaz*, 922 F.2d at 1006; *see also Cruz*, 602 F. Supp at 852-53.

2. *Robbins*. Napoli argues that a recorded settlement agreement between Eisen and the Transit Authority reveals that the settlement in the *Robbins* case was based upon "an evaluation of the entire case and the result of a special relationship between Eisen and attorneys at the Transit Authority rather than on a witness' prior trial testimony that was fraudulently coached by Napoli. He also alleges that testimony given by government witness Steve DiJoseph was rendered suspect by DiJoseph's testimony in subsequent judicial proceedings. Napoli argues that DiJoseph's testimony in those proceedings demonstrate that DiJoseph is "a psychopathic liar who will say anything to obtain his immunity and get back his license to practice law." Napoli Mem. at 4.

As with the allegedly new evidence regarding the Mulnick case, the allegedly new evidence regarding DiJoseph's motivation in testifying against Napoli is merely cumulative impeaching material. DiJoseph was extensively cross-examined about previous instances of lying and incentives to lie during the petitioner's trial. As previously noted, additional impeachment material is insufficient grounds for a new trial.

Moreover, Napoli fails to demonstrate that the information about the settlement is "new." To prevail on a Rule 33 motion, a defendant must show that the evidence which forms the basis for the motion is in fact new and was not discoverable prior to or during trial. *United States v. Alessi*, 638 F.2d 466, 479 (2d Cir. 1980); *Cruz*, 602 F. Supp. at 830-31; *Castano*, 76 F. Supp. at 823-24. Because petitioner makes no showing as to why such evidence is new and could not have been discovered with due diligence prior to or during trial, his motion with respect to Robbins also fails.

3. *Ferri and Rehberger*. Napoli also claims to have found new evidence that, he states, impeaches the credibility of Donald Zoeller, who testified at Napoli's trial about the *Ferri* case. Napoli offers only innuendo to suggest what this evidence might be: he states that, although Zoeller testified at Napoli's trial that he had a friendship with a female prosecutor "initially handling the Eisen case," it has since "been determined as recently as December 1992 that their relationship was much more intimate" than Zoeller's testimony suggested. Napoli Mem. at 5. In any event, such evidence constitutes impeachment material which, for reasons previously stated, is an insufficient basis to warrant a new trial.

Napoli next claims that he has in his possession, unidentified "documentary evidence" showing that he was not involved with certain testimony given in the *Rehberger* case-and that other co-defendants "were responsible for what occurred in *Rehberger*." Napoli Mem. at 5. Napoli nowhere states what this evidence is or otherwise describes it. Thus, he makes no showing that such evidence qualifies as "new," could not have been discovered with due diligence before or during his trial, or vindicates him of his participation in the fraud perpetrated in the *Rehberger* case.

For the reasons stated above, defendants' motions are denied.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED .

Dated:
Brooklyn, New York
August 28, 1993

signature
United States District Judge

APPENDIX B

United States Court of Appeals for the Second Circuit

Nos. 1362 through 1366 — August Term, 1993
(Argued: May 18, 1994 Decided: August 4, 1994)
Docket Nos. 93-2587, -2593, -2594, -2700, -2704

JOSEPH P. NAPOLI, MARTY GABE, DENNIS RELLA, ALAN WEINSTEIN and HAROLD FISHMAN
Petitioners-Appellants,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Before: MESKILL, MINER and MAHONEY, *Circuit Judges.*

Appeal from an order of the United States District Court for the Eastern District of New York (Sifton, J.) denying motions to vacate and set aside RICO convictions for conducting and conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity, the district court having concluded that jury charge was consistent with requirement that defendant play some part in directing affairs of RICO enterprise.

Affirmed.

JOSEPH P. NAPOLI, Manhasset, NY,
Pro Se

MARTIN J. SIEGEL, New York, NY,
for *Petitioner-Appellant Marty Gabe.*

RICHARD E. MISCHEL, New York, NY,
for *Petitioner-Appellant Dennis Rella.*

RONALD E. DePETRIS, New York, NY,
for *Petitioner-Appellant Alan Weinstein.*

STEVEN R. KARTAGENER, New York, NY,
for *Petitioner-Appellant Harold M. Fishman.*

FAITH E. GAY, Special Assistant United States Attorney, Brooklyn, NY (Zachary W. Carter, United States Attorney for the Eastern District of New York, Emily Berger, Assistant United States Attorney, Brooklyn, NY, of counsel), *for appellee.*

MINER, *Circuit Judge:*

Petitioners-appellants Joseph Napoli, Harold Fishman, Marty Gabe, Dennis Rella and Harold Weinstein appeal from an August 31, 1993 order of the United States District Court for the Eastern District of New York (Sifton, J.), denying their motions, brought pursuant to 28 U.S.C. § 2255, to vacate and set aside their convictions. Appellants were convicted, following a jury trial, of conducting, and of conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962(c) and 1962(d). In their section 2255 motions, appellants contended that the district court's charge on the element of section 1962(c) (requiring that the defendant "conduct or participate, directly or indirectly, in the conduct" of the affairs of the RICO enterprise, a charge based upon the settled law of this Circuit, *see United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981), was incorrect under the Supreme Court's recent decision in *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993). The district court denied the motions, concluding that (1) there was no procedural bar to the habeas applications; (2) the charge given satisfied *Reves*; and (3) any error, was, at most, harmless. For the reasons that follow, we affirm.

BACKGROUND

The convictions in this case arose from appellants involvement in Morris J. Eisen, P.C., a large Manhattan law firm that specialized in personal injury suits. Napoli and Fishmanwere trial attorneys who were "Of Counsel" to the Eisen firm, with Napoli being the main trial attorney for the firm. Gabe, Rella and Weinstein were private investigators affiliated with the firm who assisted with trial preparation.

In our opinion affirming the convictions in this case, we summarized the evidence as follows:

> The evidence at trial established that the defendants conducted the affairs of the Eisen law firm through a pattern of mail fraud and witness bribery by pursuing counterfeit claims and using false witnesses in personal injury trials, and that the Eisen firm earned millions in contingency fees from personal injury suits involving fraud or bribery. The methods by which the frauds were accomplished included pressuring accident witnesses to testify falsely, paying individuals to testify falsely that they had witnessed accidents, paying unfavorable witnesses not to testify, and creating false photographs, documents, and physical evidence of accidents for use before and during trial. The Government's proof included the testimony of numerous Eisen firm attorneys and employees as well as Eisen firm clients, defense attorneys, and witnesses involved in fraudulent personal injury suits. Transcripts, correspondence, and trial exhibits from the fraudulent personal injury suits were also introduced.

United States v. Eisen, 974 F.2d 246, 251 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1841 (1993):

The jury considered illegal acts committed in eighteen personal injury lawsuits in which the plaintiffs were represented by the Eisen firm. Appellants were found guilty of racketeering acts involving the following cases:

> Napoli:
> Ferri, Mulnic, Robbins, Rehberger
>
> Fishman:
> Aboud, Schwartz, Tuning, Nieves
>
> Rella:
> Miceli, Rehberger, Schwartz
>
> Gabe:
> Robbins, Stanton, Nieves
>
> Weinstein:
> Aboud, Schwartz, Tuning, Nieves, Metrano

Id.

At trial, the district court charged the jury on the substantive RICO violation as follows:

> [T]he prosecution must show that the defendant whose case you are considering *knowingly and intentionally conducted or participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity*. . . .
>
> Simply put, the prosecution must prove that there is a meaningful connection between the pattern of racketeering activity and the affairs of the enterprise, that is, that the defendant knew of the existence of the enterprise and intended that its affairs be furthered by the defendant engaging in a pattern of racketeering activity. . . .

> *The prosecution is not required to prove that the defendant participated in the management or control of the enterprise.* The prosecution is, however, required to prove that the defendant's actions were related to the enterprise and that those acts were known to and were intended to further the affairs of the enterprise and did in fact further the affairs of the enterprise.
>
> The prosecution need not prove, as the statute indicates, that the defendant directly participated in the conduct of the affairs of the enterprise. It must prove, however, that the defendant either directly or indirectly conducted or participated in the conduct of the enterprise's affairs through the pattern of racketeering activity.

J.A. at 33-34 (emphasis supplied).

The portion of the charge in which the district court instructed the jury that it need not find that the defendants participated in the management or control of the enterprise was, at the time it was given, a correct statement of the law of this Circuit under our decision in *Scotto*. 641 F.2d at 54. None of the appellants challenged the charge. On direct appeal, appellants raised numerous challenges to their convictions, all of which were rejected by this Court in an August 17, 1992 opinion. 974 F.2d 246.

On October 13, 1992, *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993), was argued to the Supreme Court, which rendered its decision in that case on March 3, 1993. Settling a split among the circuits, *compare Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir.) (en banc) (adopting "operation or management" test), *cert. denied*, 464 U.S. 1008 (1983) *with Bank of Am. Nat'l Trust & Sav. Assn. v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986) (rejecting same test), and overruling in part our decision in *Scotto*, the Court

answered in the affirmative the question "whether one must participate, in the operation or management of the enterprise itself to be subject to liability under [18 U.S.C. § 1962(c)]." 113 S. Ct. at 1166, 1172-73.

None of the petitioners, except Napoli, challenged the propriety of the jury charge on direct appeal. Napoli apparently noted in his reply brief that certiorari had been granted in *Reves* He also noted this fact in his petition for rehearing to this court and in his petition for certiorari. On April 8, 1993, about one month after the Court decided *Reves,* Fishman apparently filed a supplemental petition for certiorari[1] requesting that *Reves* be applied to his case. The Supreme Court denied each of appellants' petitions for certiorari. 113 S Ct. 1841 (Apr. 19, 1993) (Napoli, Rella, Weinstein and Fishman); 113 S. Ct. 1619 (Mar. 22, 1993) (Gabe).

During the Summer of 1993, appellants moved the district court, pursuant to 28 U.S.C. § 2255, to vacate and set aside their convictions, arguing that the district court's charge was incorrect in light of *Reves*. On August 28, 1993, the district court denied the motions, finding that (1) there was no procedural bar to the section 2255 applications; (2) the charge given satisfied *Reves;* and (3) any error was, at most, harmless. This appeal followed.

DISCUSSION

1. *Reves v. Ernst & Young*

Under section § 1962(c), it is illegal "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate ar foreign commerce, to conduct or

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[1] The Government asserts that it could not locate this supplemental petition, and Fishman has not presented it to this Court.

participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. *Reves* involved a civil RICO action brought by the trustee in bankruptcy of a farming cooperative against outside accountants who allegedly filed false financial statements for the cooperative, the charged enterprise. The district court in that case dismissed the section 1962(c) claim because the plaintiffs had failed to demonstrate that the accountants had participated in the operation or management of the enterprise, as required under the Eighth Circuit's interpretation of the provision.

The Supreme Court agreed with the Eighth Circuit's interpretation. First, the Court concluded that the word "conduct," as it was used in the provision, required that the defendant exercise some degree of direction over the affairs of the enterprise. 113 S. Ct. 1169-70. The Court then reasoned,

> Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of § 1962 (c) comes into focus. In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required. The "operation or management" test expresses this requirement in a formulation that is easy to apply.

Id. at 1170 (footnote omitted).

The Court further recognized that liability under section 1962(c) was not limited to "upper management," noting that "[a]n enterprise is operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management. *Id.* at 1173. However, the Court declined to decide how far § 1962(c) extends down the ladder of operation because it was clear that the accountants in that case were not acting under the direction of the cooperative's officers or board. *Id.* n.9.

The Government argues that the instructions given by the district court in this case, taken as a whole, are consistent with *Reves*. Because the district court instructed the jury that the prosecution was not required to prove that the defendants participated in the management or control of the enterprise, we will assume for purposes of this appeal that the instructions were erroneous. Nevertheless, we conclude that Napoli and Fishman cannot show that any error in the instructions resulted in a complete miscarriage of justice such as would justify relief under section 2255, and Gabe, Rella and Weinstein cannot demonstrate cause for failing to challenge the instruction on direct appeal.

2. *Napoli and Fishman*

As we have noted, none of the appellants objected to the RICO instructions at trial, and only Napoli and Fishman challenged the instructions before their direct appeals were exhausted. Even if we assume that Napoli and Fishman preserved their challenges, we must bear in mind that not "every asserted error of law can be raised on a § 2255 motion." *Davis v. United States*, 417 U.S. 333, 346 (1974). The grounds provided in section 2255 for collateral attack on a final judgment in a federal criminal case are narrowly limited, and it has "long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *United States v. Addonizio*, 442 U.S. 178, 184 (1979). As a general rule, "relief is available under § 2255 only for a constitutional error, a lack of jurisdiction in the sentencing

court, or an error of law that constitutes a fundamental defect which inherently results in a complete miscarriage of justice.'" *Hardy v. United States*, 878 F.2d 94, 97 (2d Cir. 1989) (quoting *Addonizio*, 442 U.S. at 185 (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962))). We conclude that, as to Napoli and Fishman, any error of law committed by the district court in charging the jury was not such a fundamental defect giving rise to a complete miscarriage of justice as to support a collateral attack.

Under the plain error rule applicable to the review on direct appeal of challenges not raised at trial, we have held that a jury instruction which omits an element of the offense does not warrant reversal if the element was proven by overwhelming evidence. *See United States v. Tillem*, 906 F.2d 814, 824-25 (2d Cir. 1990). In *Tillem*, we were faced with a challenge to a RICO instruction that failed to require that the predicate acts be interrelated and continuous. We concluded that, although the charge would have been reversible error had it been objected to at trial, reversal was not warranted under the plain error rule because the proof overwhelmingly established that the predicate acts were interrelated and continuous. *Id.* at 825. On the state of the record in that case, we found that "any error resulting from the deficient instructions did not affect the fundamental fairness of the trial." *Id.*; *see also Ianniello v. United States*, 10 F.3d 59, 63-65 (2d Cir. 1993) (defective instruction did not warrant relief on § 2255 motion in light of overwhelming evidence).

Similarly, in *United States v. Thai*, No. 92-1641, 1994 WL 365425, at *29 (2d Cir. July 11, 1994), we rejected the appellant's challenge to a RICO instruction that allegedly did not comply with *Reves*. In that case, the proof at trial demonstrated that the appellant had played some part in directing the affairs of the charged enterprise. The plain error analysis applied in *Tillem* and *Thai* applies *a fortiori* here, since the plain error standard, under which we will correct an error that is "plain," "affect[s] substantial rights"

and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *United States v. Olano*, 113 S. Ct. 1770, 1779 (1993) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)) (alteration in *Olano*), is less stringent than the section 2255 standard. Here, Napoli and Fishman cannot show that any error amounted even to plain error, let alone surmount the higher burden of showing that the error amounted to "a fundamental defect which inherently results in a complete misarriage of justice."

In his case, there was overwhelming evidence presented to the jury that Napoli and Fishman played some part in directing the affairs of the charged enterprise. Although Napoli and Fishman contend that they were no more than outside, "Of Counsel," attorneys to the Eisen firm, the evidence demonstrated that they were not merely providing peripheral advice, but had participated in the core activities that constituted the affairs of the Eisen firm, namely, trying cases and obtaining settlements. *Cf. Azrielli v. Cohen Law Offices*, 21 F.3d 512, 521-22 (defendant who merely acted as attorney in allegedly fraudulent real estate transactions did not participate in management or control of RICO enterprise). Moreover, they discharged their responsibility through a pattern of illegal acts. In the *Ferri, Mulnic, Robbins* and *Rehberger* cases, the jury found that Napoli had procured false testimony through bribery, fabricated testimony for witnesses at trial and suborned perjury. The jury also found that Fishman had bribed witnesses, committed mail fraud and instructed witnesses to testify falsely in connection with the *Aboud, Schwartz, Tuning* and *Nieves* cases.

As attorneys for the Eisen law firm with primary responsibility for the actual litigation of lawsuits, Napoli and Fishman exercised a significant degree of direction over the affairs of the enterprise. Their role plainly involved participating in the control or management of the firm, within the definition of *Reves*. On the record in this case, we conclude as we did in *Tillem* that the challenged instruction did not "affect the fundamental fairness of

the trial," 906 F.2d 814. That being so, we must conclude that the instruction did not amount to a "fundamental defect which inherently results in a complete miscarriage of justice" warranting relief under section 2255.

3. *Gabe, Rella and Weinstein*

Unlike Napoli and Fishman, Gabe, Rella and Weinstein failed to raise their challenges on direct appeal. Accordingly, our review of their challenges is more limited. It is settled that a procedural default of even a constitutional issue will bar review under section 2255 unless the petitioner can show cause excusing the default and actual prejudice resulting from the challenged error. *Campino v. United States*, 968 F.2d 187, 189-90 (2d Cir. 1992); *see also United States v. Frady*, 456 U.S. 152, 166-68 (1982).

Relying on our decision in *Ingber v. Enzor*, 841 F.2d 450, 454-55 (2d Cir. 1988), these appellants argue that it would have been futile to raise their challenges on direct appeal in light of the settled law in this Circuit, and that this futility should excuse their default. While it may have been futile to raise the challenges in the district court, inasmuch as that court was bound by our precedents, we do not believe that it would have been futile to raise the challenges on direct appeal, and it certainly would not have been futile for these appellants to include the challenges in their petitions for certiorari.

In *Ingber*, we were faced with a defendant who sought to collaterally attack his conviction on a section 2255 motion after the Supreme Court interpreted the mail fraud statute 18 U.S.C. § 1341, in a way that was favorable to him. 841 F.2d at 452-53. The Supreme Court's decision was handed down after the defendant had exhausted his direct appeals and followed a decade of consistent precedent to the contrary in this Court and numerous other circuit courts. *Id.* at 454. We concluded that any attempt to raise the issue on direct appeal would have been "patently futile." *Id.* at 455. By contrast, there were several stages in the litigation at which Gabe,

Rella and Weinstein could have raised their challenges to the jury instruction. As Napoli had done, they could have brought to this Court's attention that other circuits disagreed with our analysis in *Scotto* and that the Supreme Court had granted certiorari in *Reves* to resolve the split among the circuits on the construction of section 1962(c). Moreover, they could have raised the challenges in their petitions for certiorari, as did Fishman; given the split among the circuits, a factor not present in *Ingber*, and the fact that certiorari had been granted in *Reves*, it would have been anything but futile to do so. Accordingly, we must conclude that Gabe, Rella and Weinstein have not shown cause to be relieved from their procedural default and thus are not entitled to the relief they seek.

CONCLUSION

The order of the district court is affirmed.